IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1503

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,

Appellants,

vs.

THE WICHITA BOARD OF TRADE, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

JURISDICTIONAL STATEMENT

RICHARD M. FREEMAN
CHRISTOPHER A. MILLS
400 West Madison Street
Chicago, Illinois 60606

CHARLES W. HARRIS
830 First National
Bank Building
Wichita, Kansas 67202
Attorneys for Appellants

Of Counsel:
EARL E. POLLOCK
233 South Wacker Dr.
Chicago, Illinois 60606

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS.

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the District of Kansas, entered on February 23, 1977, requiring that they refund approximately $3,000,000 in charges for the in-transit inspection of grain collected under tariffs which had been approved by the Interstate Commerce Commission and which were later ordered canceled by the Commission following a remand pursuant to this Court's decision in *Atchison, Topeka and Santa Fe Railway Company* v. *Wichita Board of Trade*, 412 U. S. 800 (1973).

OPINIONS BELOW

The February 23, 1977 opinion of the District Court for the District of Kansas is not yet reported. The opinion of the

Interstate Commerce Commission on remand is reported at 349 I. C. C. 89 (1975). Copies of the opinions of the District Court and the Commission on remand are attached hereto as Appendices A and B.*

JURISDICTION

This suit was originally brought under 28 U. S. C. § 1336 to set aside an order of the Interstate Commerce Commission finding certain new freight charges proposed by the appellant railroads to be just, reasonable and otherwise lawful. The suit was heard by the three-judge District Court for the District of Kansas, convened pursuant to 28 U. S. C. §§ 2325 and 2284, and that Court remanded the case to the Commission and "suspended" collection of the charges by appellants. A direct appeal to this Court from the District Court's judgment was taken by appellants pursuant to 28 U. S. C. §§ 1253 and 2101(b), and this Court stayed the District Court's judgment pending its review thereof. This Court subsequently reversed the District Court's suspension of the charges, holding that the Court lacked power to "suspend" carrier-made rates, but sustained its remand to the Commission. On remand, the Commission found the charges not shown to be just, reasonable and otherwise lawful and ordered them prospectively canceled. On February 23, 1977 (subsequent to the Commission's decision on remand), the three-judge District Court entered judgment (App. A1 *et seq.*) directing appellants to refund all new charges collected during the period when this Court's stay of its earlier judgment was in effect. On March 2, 1977, appellants filed their notice of appeal to this Court. Jurisdiction of this Court to review the District Court's decision on direct appeal appears to be conferred by 28 U. S. C. §§ 1253 and 2101(b) prior to their amendment by Pub. L. No. 93-584, 88 Stat. 1918

* Pages of the Appendices are cited herein as, *e.g.*, "App. A1".

(January 2, 1975).* *E.g., Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671 (1943). There is a question, however, as to whether appellants' appeal properly lies to this Court or to the Court of Appeals** since it involves disposition of a fund collected by appellants during the pendency of judicial proceedings to review an Interstate Commerce Commission rate order. *Public Service Commission* v. *Brashear Freight Lines*, 312 U. S. 621 (1941); *United States* v. *Interstate Commerce Commission*, 337 U. S. 426 (1949).

QUESTIONS PRESENTED

1a. Does this Court have jurisdiction under 28 U. S. C. § 1253 to entertain a direct appeal from a supplementary refund order of a three-judge District Court properly convened to review an order of the Interstate Commerce Commission?

1b. Was the refund issue within the statutory purpose for which the three-judge District Court was convened, or should it have been referred to the single district judge to whom the case was initially assigned?

2. Does the District Court have jurisdiction to order refunds of railroad rates which were collected pursuant to tariffs initially approved but later ordered prospectively canceled by the Interstate Commerce Commission, which were never found to be unreasonable by the Commission with respect to the period involved, and where the Commission itself in ordering the rates canceled specifically refused to require refunds?

* Pub. L. No. 93-584 repealed § 2325 of Title 28, United States Code. Under the repealer, actions to review Interstate Commerce Commission orders commenced on or after March 1, 1975, must be brought in the Court of Appeals pursuant to the Hobbs Act. However, such actions which were pending on March 1, 1975 are not affected and "shall proceed to final disposition under the law existing on the date they were commenced" (Pub. L. No. 93-584, § 10).

** Simultaneously with the filing of their notice of appeal to this Court appellants filed a protective notice of appeal to the United States Court of Appeals for the Tenth Circuit. The notice of appeal to the Court of Appeals is attached hereto as Appendix D.

3. Was the District Court's refund order an improper intrusion into the Commission's primary jurisdiction to determine the reasonableness of rates and the equities of restitution in this case?

STATUTES INVOLVED

The pertinent statutes involved in this appeal are set forth in Appendix H attached.

STATEMENT

This appeal arises out of a rate suspension proceeding conducted by the Interstate Commerce Commission under § 15(7) of the Interstate Commerce Act, 49 U. S. C. § 15(7) (App. H1-H2), prior to its amendment by Pub. L. No. 94-210, 90 Stat. 31 (February 5, 1976), and involving new charges proposed by the appellant railroads* for in-transit grain inspection services. The charges were suspended by the Commission for the maximum statutory seven-month period, which was voluntarily extended by the railroads for an additional six months, and, on May 4, 1971, after the Commission had found that the charges were just, reasonable and otherwise lawful (I&S Docket No. 8548, *Inspection In Transit, Grain and Grain Products,* 339 I. C. C. 364 (1971) and 340 I. C. C. 69 (1971)), the charges went into effect.

An action to review the Commission's order was brought in the three-judge District Court by the appellees, consisting principally of certain grain dealers and exchanges. The District Court remanded the matter to the Commission for further proceedings and "suspended" the charges which then had been in effect for over a year. *Wichita Board of Trade* v. *United States,* 352 F. Supp. 365 (D. Kan. 1972).

The appellant railroads appealed to this Court and, on July 7, 1972, this Court entered an order staying the District Court's judgment pending determination of the railroads' appeal. *Atchison, Topeka and Santa Fe Railway Company* v. *Wichita Board of Trade,* 409 U. S. 801. On June 18, 1973, this Court entered its opinion and order on the merits of the railroads' appeal, *Atchison, Topeka and Santa Fe Railway Company* v. *Wichita Board of Trade,* 412 U. S. 800, reversing the District Court's suspension of the charges but affirming the District Court's remand of the case to the Commission. In sustaining the remand of the case to the Commission, this Court emphasized the Commission's broad discretion to adjudicate the lawfulness of the involved inspection charges and, if it found the charges unjustified, to determine what steps, if any, should be taken with respect to charges already collected by the railroads pursuant to their tariffs as initially approved by the Commission. The Court noted that the Commission might determine on remand that some further steps (such as ordering refunds) should be taken to protect the shippers, or that no further action is necessary in light of the availability to shippers of separate actions for reparations (412 U. S. at 823-824, 826).

Finally, footnote 1 to the Court's *Wichita* opinion, 412 U. S. at 802, provided as follows with respect to the Court's earlier stay of the District Court's judgment:

> We have previously stayed the judgment of the District Court on condition that appellant railroads keep account of the amounts received from in-transit charges, 409 U. S. 801 (1972). We hereby direct the District Court to enter an order, consistent with this opinion, regarding the disposition of those amounts.

On January 21, 1975, the Commission issued a Report and Order on Further Reconsideration (remand) in I & S Docket No. 8548, in which it found the new in-transit grain inspection charges in the Western District of the United States not shown to be just and reasonable and otherwise lawful, and ordered the railroads' tariffs containing such charges canceled. *Inspection*

* The appellants, railroads operating in the Western District of the United States, are enumerated in the list attached hereto as Appendix I.

in Transit, Grain and Grain Products, 349 I. C. C. 89 (App. B1 *et seq.*). The Commission's Report and Order on Further Reconsideration provided as follows with respect to the relief granted (App. B6):

> Of course, should relief in addition to that which is provided in this report and order [prospective cancellation of the tariffs] be desired by protestants, action under section 13(1) of the act must be commenced.

No party sought judicial review of the Commission's January 21, 1975 decision on remand, and the inspection charge tariffs were canceled effective March 28, 1975.

Subsequent to the Commission's decision on remand, the question of whether the appellant railroads should be required to refund all or a portion of the $11,000,000 in inspection charges collected during the four-year period when the tariffs were in effect has been raised in several different ways. On June 30, 1975, the Commodity Credit Corporation of the U. S. Department of Agriculture filed a complaint with the Commission under § 13(1) of the Interstate Commerce Act (App. H2-H3) seeking reparation (refunds) of inspection charges collected by the appellant railroads during a seven-month period in 1972. The Commodity Credit Corporation and several other private shippers subsequently filed five additional § 13(1) complaints seeking reparation of inspection charges collected by appellants during other periods—including the period covered by this Court's stay order. The § 13(1) complaint proceedings are being held in abeyance by the Commission pending its resolution of the refund issue in the basic § 15(7) proceeding, I&S Docket No. 8548, which has been reopened for this purpose pursuant to the recent decision of the District of Columbia Court of Appeals in *Secretary of Agriculture* v. *Interstate Commerce Commission,* described below.

On August 28, 1975, the appellees filed a motion in the District Court requesting it to order refunds of inspection charges collected by the appellant railroads during the period

when this Court's order staying the District Court's improper "suspension" of the charges was in effect (July 7, 1972 through June 18, 1973). Approximately $3,000,000 of inspection charges were collected by the appellants during this period. The motion was granted by the District Court in its opinion and order entered February 23, 1977 (App. A1 *et seq.*), review of which is sought herein.*

On September 5, 1975, the Secretary of Agriculture of the United States filed a motion with the Commission in I&S Docket No. 8548, seeking an order pursuant to § 15(7) requiring the railroads to refund all inspection charges collected during the entire period when the inspection charge tariffs were in effect. By order dated November 12, 1975, the Commission summarily denied the Secretary's motion. The Secretary then instituted an action to review the Commission's November 12 order in the United States Court of Appeals for the District of Columbia Circuit (No. 76-1026, *Secretary of Agriculture* v. *Interstate Commerce Commission*) in which the Secretary requested the Court, *inter alia,* to enter an order remanding the case to the Commission with directions to issue a refund order. In a *per curiam* decision issued March 11, 1977, the Court of Appeals remanded the case to the Commission for further findings but refused to interfere with the Commission's discretionary power under § 15(7) to require or not to require refunds. The opinion of the Court of Appeals is attached hereto as Appendix G.

THE QUESTIONS ARE SUBSTANTIAL

The threshold question presented by this appeal is the proper constitution of the District Court for purposes of deciding appellees' motion for refunds. If the refund question was within the statutory purpose underlying the requirement that appeals

* On March 11, 1977, the District Court entered an order staying its earlier judgment and order of February 23, 1977, pending appellants' appeals to this Court and to the United States Court of Appeals for the Tenth Circuit. The District Court's order of stay is attached hereto as Appendix E.

from Interstate Commerce Commission orders be decided by district courts of three judges, then the question was properly decided by the entire three-judge panel and direct appeal to this Court lies under 28 U. S. C. §§ 1253 and 2101(b) as those provisions existed when appellees' initial appeal to the Kansas District Court was filed. On the other hand, several decisions of this and other courts indicate that the refund question may be the type of ancillary question that should be decided by a single district judge with review by the Court of Appeals.* E.g., *Public Service Commission* v. *Brashear Freight Lines*, 312 U. S. 621 (1941).

Clearly, the questions presented as to the validity of the District Court's action in ordering refunds are substantial. As it did earlier in its improper suspension of the inspection charges pending remand to the Commission, the District Court has again improperly interfered with the powers and responsibilities of the Interstate Commerce Commission to determine the reasonableness of past rates and the equitable aspects of refunding such rates. *Secretary of Agriculture* v. *Interstate Commerce Commission*, ... F. 2d ..... (App. G). In addition, the District Court patently misinterpreted footnote 1 to the *Wichita* opinion since its refund order is wholly inconsistent with that opinion.

* The District Court's judgment on the refund question was entered by the entire three-judge panel and was unanimous. The appellants have filed simultaneous protective appeals to this Court and to the United States Court of Appeals for the Tenth Circuit, a procedure tacitly approved by this Court in *Swift & Co.* v. *Wickham*, 382 U. S. 111, 114 n. 4 (1965). A similar procedure was followed in *Middlewest Motor Freight Bureau* v. *United States*, 433 F. 2d 212 (8th Cir. 1970), *cert. denied* 402 U. S. 999 (1971), where simultaneous appeals were filed, this Court dismissed the direct appeal to it for want of jurisdiction, and the case was decided by the Court of Appeals.

On March 14, 1977, the Tenth Circuit Court of Appeals entered an order suspending and abating appellants' appeal to that Court pending resolution of their appeal to this Court. A copy of the March 14 order of the Court of Appeals is attached hereto as Appendix F.

I. There Is a Threshold Question as to Whether the Decision Below Should Have Been Rendered by a Single District Judge Rather Than the Entire Three-Judge Panel.

There is no question that the three-judge District Court was properly convened to review the Commission's initial orders on the merits of the grain inspection charges pursuant to 28 U. S. C. § 2325 (App. H1). Nor is there any question that this Court properly took jurisdiction of appellants' earlier direct appeal from the District Court's decision on review of the Commission's initial orders pursuant to 28 U. S. C. § 1253. However, there is a substantial question as to whether the District Court's later refund order should have been decided as it was by the entire three-judge panel, with direct appeal to this Court, or by the single district judge to whom the case was initially assigned, with appeal to the Court of Appeals and review by this Court via certiorari.

The District Court believed the refund question should be decided by all three judges (App. A4-A5). However, several decisions of this and other courts indicate that questions relating (as the refund question does) to the payment of money are ancillary questions "not within the statutory purpose for which the two additional judges had been called" and which thus should be decided by a single district judge. *Public Service Commission* v. *Brashear Freight Lines*, 312 U. S. 621, 625 (1941); *United States* v. *Interstate Commerce Commission*, 337 U. S. 426, 442-443 (1949); see, also, *Middlewest Motor Freight Bureau* v. *United States*, 433 F. 2d 212 (8th Cir. 1970), *cert. denied* 402 U. S. 999 (1971). On the other hand, neither the *Brashear* nor *Interstate Commerce Commission* decisions of this Court involved Commission adjudication of carrier-made rates under § 15(7) of the Interstate Commerce Act, under which (as we show below) the question of refunds itself involves "a question as to the reasonableness of rates that called for exercise of the Commission's primary jurisdiction" (*Interstate Commerce Commission, supra*, 337 U. S. at 437).

The District Court's own opinion that the refund question should be decided by all three judges, the apparently contrary holding by this and other courts in analogous but not identical circumstances, and the discussion under Part III below (pp. 13-16) all leave the appellants with considerable doubt as to whether jurisdiction of their appeal from the District Court's refund order properly lies in this Court or the Court of Appeals. It is for this reason that appellants have perfected simultaneous protective appeals to this Court and to the United States Court of Appeals for the Tenth Circuit.* If this Court determines that it does not have jurisdiction of this appeal at this stage, appellants will then pursue their appeal in the Tenth Circuit Court of Appeals.

II. The District Court's Refund Order Is Contrary to the Express Terms of § 15(7) of the Interstate Commerce Act, Which Vests Sole Discretion in the Interstate Commerce Commission to Require Refunds of Rates Collected Prior to Completion of Proceedings Under That Section, and to the Commission's Exercise of Its Discretion in This Case.

Section 15(7)** provides an expeditious method for the conduct of an investigation of carrier-proposed rates, and "represents a careful accommodation of the various interests involved." *United States* v. *S. C. R. A. P.*, 412 U. S. 669, 297 (1973). Section 15(7) authorizes the Commission to initiate an investigation into the lawfulness of railroad tariffs containing proposed new rates and, pending such investigation, to suspend the tariffs for a maximum of seven months. The section goes on to provide:

* As previously noted, the Tenth Circuit Court of Appeals has entered an order suspending and abating appellants' appeal to that Court pending disposition of this appeal (Appendix F).

** Section 15(7) was amended effective February 5, 1976 (long after this proceeding was instituted) by Public Law 94-210, the Railroad Revitalization and Regulatory Reform Act of 1976. The amended language as it pertains to rate changes proposed by rail carriers now appears as 49 U. S. C. § 15(8).

> If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate . . . shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission . . . upon completion of the hearing and decision *may* by further order require the interested carrier or carriers to refund, with interest, to the person in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. [Emphasis supplied.]

Section 15(7) thus expressly vests discretionary power in the Commission to require refunds of increased rates collected (as the inspection charges were) following the expiration of the suspension period but prior to final Commission adjudication of the merits of the increase.

The discretionary nature of the Commission's refund power under § 15(7) as it existed prior to the 1976 amendments to the Interstate Commerce Act was recognized by this Court in *Wichita*, 412 U. S. at 823-824:

> Congress did provide protection to shippers for the period after the rates go into effect. The Commission may require the carriers to keep detailed accounts of the income received as a result of the increase. If the increase is ultimately found unjustified, the Commission may order a refund. 49 U. S. C. § 15(7). Even if the Commission does not do so in a suspension proceeding, the shippers may recover reparations under some circumstances. 49 U. S. C. §§ 8, 9.

See, also, 412 U. S. at 826, where the Court noted that the availability of actions for reparations may adequately protect shippers from irreparable damage, but that "[t]he Commission may determine on remand that some further steps must be taken to protect the shippers."

The Commission's discretion under § 15(7) to order or not to order refunds was also recently affirmed by the Court

of Appeals for the District of Columbia Circuit in a case involving the very grain inspection charges in issue here. In *Secretary of Agriculture* v. *Interstate Commerce Commission*, ... F. 2d ....., the Court of Appeals held (App. G3-G4):

> [T]he Supreme Court has recognized that the Commission's authority to order a refund under § 15(7) is discretionary, *Atchison T. & S. F. Ry. Co.* v. *Wichita Board, supra* note 1, 412 U.S. at 817-826, esp. at 824 [footnote omitted]. There is no reason to believe that use of a discretionary word was inadvertent. Since § 15(7) contains "shall" six times and "may" five times, Congress appears to have deliberately distinguished mandatory and discretionary duties.*

The Commission's final decision on the merits in this proceeding, involving investigation and suspension of new and increased grain inspection charges under § 15(7) prior to the 1976 amendments, was its decision on remand following judicial review by this Court in *Wichita*. In that decision the Commission held for the first time that the inspection charges were not shown to be just, reasonable and otherwise lawful and ordered the underlying tariffs canceled *prospectively* (App. B15). However, the Commission chose not to require refunds of any inspection charges collected during the four-year period when the tariffs were in effect. Rather, the Commission exercised its discretion under § 15(7) by specifically directing (App. B6):

> Of course, should relief in addition to that which is provided in this report and order be desired by protestants

* The discretionary nature of the Commission's § 15(7) refund power may also be inferred from the 1976 amendments which created a separate section governing investigation and suspension of rates proposed by common carriers by railroad [§ 15(8)]. The new section authorizes the Commission to suspend a railroad-proposed rate increase for an additional three months and provides for mandatory refunds—but only if the Commission has not suspended the increased rate pending investigation of its lawfulness [§ 15(8)(e)]. In the case at bar, the increased rates were suspended so the refund language of new § 15(8)(e) would not apply at all, *Secretary of Agriculture, supra* (see App. G4).

> [shippers], action under section 13(1) of the act must be commenced.

This determination by the Commission that the refund question should be deferred to separate complaint proceedings under § 13(1) of the Interstate Commerce Act was not challenged by any party in the District Court.* Thus, in ordering refunds in the face of an administratively final and unappealed Commission order under § 15(7) refusing to require refunds on the basis of the record before it (a record which contained no evidence as to the effect of massive refunds on bankrupt and other financially weak middlewestern railroads), the District Court improperly ignored the Commission's determination that the refund question should be deferred to separate § 13(1) complaint proceedings. In so doing, the District Court made the same mistake it made earlier in "suspending" the inspection charges, which this Court held in *Wichita* to be an improper interference with the Commission's discretionary powers under § 15(7).

III. The District Court Improperly Interfered with the Commission's Primary Jurisdiction to Determine Whether Rates Collected Pursuant to Tariffs Later Ordered Canceled Are Unreasonable—a Determination Which the Commission Has Not Made in This Case.

The District Court's refund order not only ignores the language of § 15(7) which expressly lodges discretionary power in the Commission to decide whether refunds should be required; it also intolerably interferes with the primary jurisdiction of the

* The Commission's determination not to order refunds directly in the § 15(7) proceeding was challenged collaterally by the Secretary of Agriculture in his petition to the District of Columbia Court of Appeals to review the Commission's denial of his subsequently-filed motion for a refund order. As previously noted, the Court of Appeals recently remanded the case back to the Commission for reconsideration and further findings but refused to interfere with the Commission's § 15(7) authority over the refund question which the Court expressly found to be discretionary. *Secretary of Agriculture* v. *Interstate Commerce Commission, supra* (see App. G3-G4).

Commission to decide whether the inspection charges were unreasonable during the period when the tariffs containing the charges were in effect.

Under the remedial scheme of the Interstate Commerce Act, the only means by which a shipper can obtain refunds of charges paid to rail carriers under their lawfully filed and effective tariffs are (1) in a § 15(7) proceeding; (2) by filing a complaint with the Commission under § 13(1) of the Act (a course which the Commission expressly indicated was the proper one for shippers desiring refunds of grain inspection charges to follow); or (3) by filing a complaint (either with the Commission or in a federal district court) under § 9 of the Act. If a shipper seeks reparations by filing a complaint with the Commission or in a district court under § 9, reparations may be awarded under § 8. However, before a recovery under §§ 8 and 9 can be awarded, a violation of the Act must be established and the law is clear that when (as here) the reasonableness of a rate or charge is in issue, that issue is within the primary and exclusive jurisdiction of the Commission. *Texas and Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1907); *Mitchell Coal and Coke Co.* v. *Pennsylvania Railroad Co.*, 230 U. S. 247, 257, 259 (1912); *Great Northern Railway* v. *Merchants Elevator Co.*, 259 U. S. 285, 291 (1922); *United States* v. *Western Pacific R. Co.*, 352 U. S. 59 (1956). Thus, before either the Commission or a court (in an appropriate § 9 proceeding) may order refund or reparation of rates collected by rail carriers pursuant to their tariffs, the collection of such rates must be found to have been unreasonable *by the Commission.*

The Commission has made no finding that the grain inspection charges were unreasonable during the period (including the period of this Court's stay order) when the tariffs containing the charges were in effect. In its decision on remand, the Commission did *not* find the tariffs to have been unreasonable during the period when they were in effect; it merely held that due to the railroads' failure to adduce certain evidence (not

previously required of them) they had failed to carry their burden of proof and, thus, that the charges were not shown to be just, reasonable and otherwise lawful and had to be canceled *for the future only.*

The District Court completely failed to understand the effect of this distinction with respect to past (as opposed to future) rates. There is, indeed, no difference between a Commission finding that rates are "unreasonable" and a Commission finding that rates are "not shown to be just and reasonable" in terms of whether the rates may lawfully be maintained *in the future.* But there is a clear distinction between the two findings in terms of whether the rates were unlawful *in the past* when they were collected (as a matter of law, *had* to be collected) pursuant to carrier tariffs properly on file with the Commission. Indeed, this Court recognized the distinction in footnote 9 to its opinion in *Wichita*, 412 U. S. at 814:

> "If the Commission finds [on remand] that the proposed rates are unreasonable, rather than that the railroads failed to carry their burden of proof, that finding might be conclusive in a subsequent proceeding."*

The distinction was also recognized in *Middlewest Motor Freight Bureau* v. *United States*, 433 F. 2d 212, 222 (8th Cir. 1970), *cert. denied* 402 U. S. 999 (1971), where the Court held that a Commission finding that a rate had not been shown to be reasonable was not a finding of any substantive violation of the Interstate Commerce Act:

> "In holding that the tariffs are unlawful, we are not expressing any affirmative judgment that the rates embodied in them are in any substantive way violative of the Act—e.g., that they are unreasonably high or discriminatory. Such a judgment lies solely within the province of the Interstate Commerce Commission. Nor does this holding imply that the tariffs were unlawful in any sense whatso-

* This Court thus also expressly recognized that the refund issue could appropriately be decided—as the Commission has ruled it should be decided here—in a subsequent complaint proceeding.

ever *prior* to the Commission's final order * * *. The conclusion that the tariffs were unlawful is restricted to the sense that by virtue of the Commission's cancellation order, as it operated prospectively, the carriers no longer had the right to maintain that particular tariff; maintenance of the tariff in violation of the order was unlawful." [Emphasis the Court's.]

IV. Only the Commission Has Power to Require Restitution in a Situation Where the Equitable Aspects of Refunding Past Rates Are Inextricably Entwined with the Commission's Normal Regulatory Responsibility.

The District Court premised its refund order largely on its conclusion that it had equitable power to order restitution of inspection charges collected by appellants as a result of this Court's stay of the District Court's earlier "suspension" of the charges. However, in so concluding the District Court ignored this Court's holding in *Wichita* that judicial suspension of the inspection charges constituted an improper interference with the Commission's primary jurisdiction to balance the competing needs of carriers and shippers (412 U. S. at 820-821) and its emphasis on the Commission's broad discretion (if it ultimately found the charges unjustified) to determine whether any additional steps should be taken to protect the shippers (412 U. S. at 823-824, 826).

The District Court relied on three decisions of this Court dating from the 1930's which it cites without any discussion (App. A10). None of these three cases, *United States* v. *Morgan*, 307 U. S. 183 (1939); *Atlantic Coast Line* v. *Florida*, 295 U. S. 301 (1935); and *Inland Steel Co.* v. *United States*, 306 U. S. 153 (1939), involved the regulatory scheme giving the Interstate Commerce Commission discretion to require refunds which is in issue here.

On the other hand, the District Court ignored the recent and apposite decision of the District of Columbia Court of Appeals in *Moss* v. *C. A. B.*, 521 F. 2d 298 (D. C. Cir. 1975), *cert. denied*

424 U. S. 966 (1976). In *Moss*, the Court held that, even where the agency has found increased rates to be unreasonable, it is for the agency and not the courts to determine whether, in light of all the circumstances, refunds should be required. The Court noted that the "equitable aspects of refunding past rates . . . are inextricably entwined with the [agency's] normal regulatory responsibility, as such refunds may substantially affect the future rates, performance and health of the industry" (521 F. 2d at 308-309).

The Interstate Commerce Commission has a responsibility to consider the financial health of the railroad industry and the effect of massive refunds on the ability of railroads such as the Rock Island (currently undergoing reorganization under the federal bankruptcy laws) and other weak midwestern roads to continue to provide adequate service in interstate commerce. Indeed, in its recent decision in *Secretary of Agriculture, supra*, the same court that decided *Moss* recognized the necessity of deferring to the Commission's evaluation of the equities of restitution in the case of the same grain inspection charges in issue here (App. G5).

The *Moss* court refused to interfere with the agency's denial of refunds on additional grounds which are apposite here (521 F. 2d at 314-315):

> "Where, as here, recovery can only be had in terms of restitution grounded in equitable considerations the circumstances just described are not such as to mandate recovery; and we leave undisturbed the Board's action in this regard. . . . Assuming *arguendo* that restitution in respect of discriminatory fares may conceivably be appropriate where a carrier knows or should have known that such fares existed in an otherwise just and reasonable fare level, the facts here do not admit of the attribution to the carrier of the requisite guilty knowledge. The fares in question were charged by the carriers in reasonable reliance on the Board's explicit approval of them. To the extent that the Board was mistaken about the lawfulness of the filing, the consequences of that mistake should not be visited upon the carriers, certainly absent any actual unjust enrichment."

Here, similarly, the railroad put the inspection charges into effect only after they were initially found lawful by the Commission, "in reasonable reliance on the [Commission's] explicit approval of them" in its 1971 initial decision (339 I. C. C. 364, *aff'd on reconsideration*, 340 I. C. C. 69). Indeed, the railroads were not at liberty to ignore the Commission's initial decision approving the charges, *Atlantic Coast Line* v. *Florida, supra,* 295 U. S. at 311-312.

V. The Court Below Patently Misinterpreted This Court's Earlier Stay Order and Opinion in This Case.

As already noted, footnote 1 to this Court's earlier opinion in this case, *Atchison, T. & S. F. Ry. Co.* v. *Wichita Board of Trade*, 412 U. S. at 802, provides as follows:

> "We have previously stayed the judgment of the District Court on condition that appellant railroads keep account of the amounts collected from in-transit charges, 409 U.S. 801 (1972). We hereby direct the District Court to enter an order, consistent with this opinion, regarding the disposition of these amounts."

The District Court's refund order is patently inconsistent with the fundamental purpose of this Court's stay order and with its opinion in *Wichita*. This Court's stay order was entered because the District Court's earlier judgment (*Wichita Board of Trade* v. *United States*, 352 F. Supp. 365 (D. Kan. 1972)), which "suspended" the inspection charges rather than merely setting aside the Commission's initial decision approving them, appeared to be in direct conflict with this Court's decision in *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U. S. 658 (1963), holding that the Commission has primary and exclusive jurisdiction to "suspend" or set aside a carrier tariff. As a condition to its stay, this Court required the appellant railroads (who had sought the stay) to keep account of all amounts received by reason of the inspection charges during the existence of the stay, and

> "[i]n the event the order suspending the charges is affirmed by this Court, refund (with interest) of such amounts to persons in whose behalf such amounts were paid, without the necessity for such persons to make applications for refunds.
>
> "In the event this Court's action should be other than an affirmance of the results reached by the district court, this Court may make such further order concerning the disposition of the aforesaid amounts as the Court may deem appropriate." (409 U. S. 801.)

In its decision on the merits, this Court held that the District Court had indeed invaded the domain of the Commission and exceeded its authority by suspending the charges (*Wichita*, 412 U. S. at 818-827). This Court thus did *not* affirm the District Court's order suspending the charges, in which case refunds would have followed automatically under the terms of the stay order. Rather, its action clearly was "other than an affirmance of the results reached by the district court" in suspending the charges.

Since this Court clearly held in *Wichita* that in the circumstances of this case it was for the Commission and not the courts to set aside ("suspend") the *tariffs* containing the charges (as opposed to the Commission's *order* finding the charges to be just and reasonable), the District Court's order requiring the railroads to refund all charges collected during the stay is wholly inconsistent with the *Wichita* opinion. Further support for this conclusion lies in this Court's recognition in *Wichita* that shippers who desire refunds have available actions for reparations (412 U. S. at 826); that it was up to the Commission on remand to determine whether "some further steps must be taken to protect the shippers" (*id.*); and that a finding that the railroads failed to carry their burden of proof (which is all that the Commission found on remand) would not be conclusive in a subsequent proceeding for reparations whereas a finding that the charges are unreasonable might be (412 U. S. at 814 n. 9).

Thus footnote 1 to this Court's opinion in *Wichita*—far from supporting the extraordinary decision below—confirms the impropriety of the District Court's refund order.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the questions presented by this appeal are substantial and of public importance and that an order noting probable jurisdiction should be entered. In the event, however, that the Court should conclude, without the necessity for further briefs or argument, that the refund question was one which should have been decided by a single district judge, then this appeal should be dismissed without prejudice to appellants' protective appeal to the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

RICHARD M. FREEMAN,
CHRISTOPHER A. MILLS,
400 West Madison Street,
Chicago, Illinois 60606.

CHARLES W. HARRIS,
830 First National
Bank Building,
Wichita, Kansas 67202,
Attorneys for Appellants.

Of Counsel:
EARL E. POLLOCK
233 South Wacker Dr.
Chicago, Illinois 60606

Dated: April 29, 1977

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
For the District of Kansas

THE WICHITA BOARD OF TRADE, et al.,
Plaintiffs,
vs.
THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, et al.,
Defendants.
Civil Action No. W-4730

OPINION OF THE COURT SUSTAINING PLAINTIFFS' MOTION FOR REFUND

Before BARRETT, *Circuit Judge*, THEIS and O'CONNOR, *United States District Judges.*

THEIS, *District Judge.*

This case and its subject matter, again before the Court, are venerable with age but not expedition, covering a time span from 1971. This litigation resulted from an Order of the Interstate Commerce Commission (hereinafter referred to as "ICC"), approving as just, reasonable and lawful proposed new or increased charges for the first inspection of grain and grain products at various points in the Western District of the United States. Shippers who had objected to the proposed new charges before the ICC sought review of the order in this entitled case, and a statutory three-judge district court was convened. An opinion was rendered May 26, 1972, cited as *Wichita Board of Trade* v. *United States*, 352 F. Supp. 365, to which reference is

made as the initial phase of this litigation. In this opinion, this three-judge court set aside the ICC order as invalid, remanded the matter back to the ICC for further proceedings, and ordered that the proposed charges be suspended until further order of the Court.

The intervening railroads appealed to the United States Supreme Court, sought and were granted a stay of that part of the Court's judgment suspending collection of the questioned rate, subject to the following conditions:

> "(2) That, as a condition of the foregoing stay, each railroad collecting in-transit grain inspection charges under the challenged tariffs shall immediately take steps, including publication of appropriate provisions in applicable tariffs, to do the following:
>
> (a) keep accurate accounts in detail of all amounts hereafter received during the existence of the stay by reason of in-transit grain inspection charges, specifying by whom and in whose behalf such amounts are paid; and
>
> (b) In the event the order suspending the charges is affirmed by this Court, refund (with interest), of such amounts to persons in whose behalf such amounts were paid, without the necessity for such persons to make applications for refunds.
>
> "In the event this Court's action should be other than an affirmance of the results reached by the district court, this Court may make such further order concerning the disposition of the aforesaid amounts as the Court may determine."

On June 18, 1973, the Supreme Court handed down its opinion affirming this Court's decision on the merits but holding that the entry by this Court of the injunction suspending the application of the rate was error, cited as the *A. T. & A. F. R. R. Co.* v. *Wichita Board of Trade*, 412 U. S. 800, 37 L. Ed. 350, 93 S. Ct. 2367. The opinion further directs this Court to handle the refunds by the following footnote:

> "We have previously stayed the judgment of the District Court on condition that appellant railroads keep account of the amounts received from in-transit charges, 409 U.S. 801 (1972). We hereby direct the District Court to enter an order, consistent with this opinion, regarding the disposition of those amounts."

In accordance with Supreme Court mandate, by order filed August 13, 1973, this Court remanded the matter to the ICC for further proceedings consistent with the opinion of the Supreme Court. No order was then entered by the Court regarding the distribution of the amounts received by the railroads by reason of their collection of the in-transit grain inspection charges during the existence of the stay, for the obvious reason further administrative action by way of reconsideration of the justness and reasonableness of the proposed rates was directed by both this Court and the Supreme Court.

By Report and Order served January 27, 1975, the ICC found that the proposed charges for the first stop for in-transit inspection of grain in the Western District had not been shown to be just and reasonable and ordered them cancelled. A petition for reconsideration filed by the railroads was denied by order served June 5, 1975, and there are no further proceedings pending before the Commission.

The prayer of the pending motion is to the effect that "the time has now ripened for refunds to the shipping public" composed of plaintiff and assignors, farmers, country elevators, large terminals, i.e., the grain trade. It is further prayed that "the amounts received by the railroads pursuant to the stay order equitably belong to the persons in whose behalf such amounts were paid and an order should be entered requiring them to refund such amounts with interest.

Again, as with every phase of this litigation, extensive briefs have been filed with the Court and protracted arguments made by learned counsel in competent adversarial demeaneor. The subject matter of the litigation has now been simply reduced to that of MONEY—a reputed fund of approximately three million dollars to be determined by the accounting here sought.

The groups of adversaries, as always, are the plaintiffs representing the grain trade as shippers, and the defendants representing the western railroads as the carriers.

The position of the defendant railroads before this Court is that they should keep this fund of money, should not have to account for it or pay it back to those from whom it was exacted.

The Three-Judge Court Issue

Initially, the question is raised by both sets of parties as to whether at this point this case remains a three-judge court case, or has become a one-judge court case before the judge to whom it was originally assigned. Our posture as to this question is that it matters little to the sound jurisdictional basis of the case. However, the three judges are unanimously agreed that the best administration of justice requires at this stage, *i.e.*, for determination and ruling upon the question of refunds jurisdictionally, that this court will remain a three-judge court. Several very good reasons for such action appeal to us. Again, as will be commented upon later in the opinion, defendants raise questions of so-called "jurisdictional" right for any Article III Court, regardless of how numerically constituted to rule on the legality of refunds from the fund accumulated under the stay order. They make the following assertions of lack of judicial power in this Court, viz.:

1. The wording of the Supreme Court's opinion constitutes a *res judicata* basis against requiring their disgorgement;
2. Congressional statutory provision, *stare decisis* by federal court decisions and by ICC's own self-serving decision of reserved power in them preclude us; and
3. Any action by us would be collateral attack on an ICC administrative decision.

While, as will be noted, we consider all of the defendants' assertions spurious and completely lacking in legal efficacy, where

both Supreme Court intent and jurisdictional thrusts are involved, the shortest and best road back to the Supreme Court is via the three-judge method as it existed prior to the recent congressional amendments deleting three-judge jurisdiction over ICC rulings.

The most illogical assertion defendants make is their statement that the ICC decision denying the ultimate validity of the proposed in-transit inspection rate was on the basis that the railroads failed to meet their burden of proof in a Section 15(7) action of making an affirmative showing of "justness and reasonableness," and their corollary contention that this is not the equivalent legally of a finding of unjustness and unreasonableness. Their implication is that some "never-never-land" exists between "reasonable" and "unreasonable." We have carefully examined the cases cited and the language of Justice Marshall in this case, finding nothing to foundation such a ludicrous legal monstrosity. As a matter of fact, it is assertions by lawyers of such illogic positions which are rapidly undermining public respect for the Bar, along with public delusionment after Watergate. We do not believe it possible to articulate an understandable distinction—lay or legal—between "not just and reasonable" and "unjust and unreasonable."

This contention is then the premise by which counsel for defendant railroads reinvoke the doctrine of primary jurisdiction in the ICC and argue that single payors of their invalid charge have only two administrative remedies before the ICC to seek to recover a payment, i.e., under either a Section 15(7) proceeding where the ICC contends and has held a refund is discretionary, or a Section 13(1) proceeding for reparation where an applicant would have the affirmative burden of showing the charge "unjust and unreasonable." Moreover, we are informed this generous invitation by the railroads for "reparation" under 13(1) is not only difficult and expensive for small shippers, but would be barred now as to any payor in this case during the stay period by a statutory limitation of action.

Defendants further assert their legal position is bolstered by two ICC actions relating to aspects of this case which would in effect make an affirmative refund by this Court to be "collateral attack" on ICC interpretation of its own power. First, they point to some language at page 93 of the ICC final opinion finding these rates not proved "just and reasonable," concerning the 15(7) and 13(1) remedies. They misread the ICC, for it is neither claimed there that such remedies are exclusive nor that what was said applied to funds collected during the stay order. Actually, it is our opinion the ICC reference to 15(7) and 13(1) remedies was a general statement about remedial collection during an entire period for which rates had been in effect, and where such rates were found later by ICC to have been invalid. Second, they infer that the action of the Secretary of Agriculture in applying to ICC for refund of Commodity Credit Corporation payment of these illegal in-transit charges and its turn-down by ICC, is some kind of precedential decision authoritative with us despite a pending appeal on its particular validity in the D. C. Circuit. We reject both assertions.

Meaning of the Marshall Opinion in the Supreme Court Decision

The sound basis of our present decision is our reliance on and reading of the plurality decision of Justice Marshall and the clear guidelines, as well as implications therefrom, directing judicial decision on refunds. Certainly, Justice Marshall's opinion delineates the scope of administrative review by the judiciary, sets forth the administrative agency options in carrying out congressional policy, sets out the criteria a court must and/or should consider, and how to weigh such criteria. The Marshall plurality squarely affirms the District Court in its reason for holding invalid the ICC action, it squarely affirmed the District Court in its action of remand to the ICC for further administrative action in accordance with its expertise for determining the

public interest and shipper-transportation interest in rates and modes of movement of goods and people in interstate commerce.

Justice Marshall's language at various places indicates to us there is no middle ground between "reasonable" and "unreasonable." Witness the statement on page 816 of the U. S. Reporter:

> "But it might be that rates for services including an in-transit inspection at the level of the general maximum, would be *reasonable* while rates for services without such inspection would be *unreasonable* at that level, or even below it." (Emphasis added.)

And at the top of page 819:

> "Carriers may put into effect any rate that the Commission has not declared unreasonable."

It is to be noted that in its order ending its reconsideration on remand from this Court and the Supreme Court, the ICC said:

> "That as the proposed new charges for the first stop for the in-transit inspection of grain at various points in the United States outside the eastern territory are not shown to be just and reasonable and otherwise lawful, the respondents herein be notified and required to cancel the applicable schedules. . . . And . . . that this proceeding be and is hereby discontinued."

Reflecting the validity of Justice Marshall's statement forbidding unreasonable rates, these rates were cancelled by the ICC and withdrawn by the railroads. Nowhere can the Court find either judicial or lay discussion pointing to or approving a lexicographic legerdemain which distinguishes "not just and reasonable" from "unjust and unreasonable."

We now turn our attention to the bulwark of our judicial authority to direct the question of refund. This we find in the unadorned language of the Supreme Court in both its stay order and its principal decision, and which is quoted verbatim at pp. 1 and 2 of this opinion. We also find it inherent in the powers of

the federal judiciary under classic equitable principles, as well as the express statutory injunctive authority (28 U. S. C. § 2324) which the Supreme Court noted but determined to have been erroneously applied by this Court's suspension of rates. The distinction made in the Marshall opinion was to the effect that while the statutory power existed to stay the rate pending final judicial determination under the equitable guidelines necessary in this factual situation, it was error to suspend the rates in review of a Section 15(7) proceeding where the Court remands the proceeding to the ICC to correct and explain its decision, and under which the railroads were entitled to charge the rates until found not just and reasonable, and hence unlawful.

The Supreme Court's enunciation of the equity powers of the District Court and its evaluation of how such powers should have been exercised are lucidly found in Part III of the Marshall opinion. These excerpts at pp. 819-20 (with citations omitted for brevity), are repeated for emphasis.

> "The power conferred on the District Court by § 2324 does not in itself include a power to enjoin the railroads from implementing a proposed new charge. Rather, that power must be considered as at best ancillary to the general equitable powers of the reviewing court, and protective of its jurisdiction.
>
> . . .
>
> "Such a power must be inferred from Congress' decision to permit judicial review of the agency action. 'If the administrative agency has committed errors of law for the correction of which the legislature has provided appropriate resort to the courts, such judicial review would be an idle ceremony if the situation were irreparably changed before the correction could be made.'
>
> "Yet it would be surprising if that power could be exercised to the extent that it might substantially interfere with the function of the administrative agency. 'The existence of power in a reviewing court to stay enforcement of an administrative order does not mean, of course, that its exercise should be without regard to the division of function which

> the legislature has made between the administrative body and the court of review.' Proper regard for that division of function requires that we hold erroneous the District Court's decision to enjoin not only the Commission's order finding the proposed rates just and reasonable but also the implementation of those rates.
>
> . . .
>
> "The terms of § 15(7) do not specifically govern this situation. [Court's note: Obviously 'this situation' in the context of the Supreme Court opinion refers to what procedural event in the rate making process occurs when a court finds ICC action to have been unlawful.] Nor is there any other provision in the relevant statutes depriving federal courts of their general equitable power to preserve the status quo to avoid irreparable harm pending review."

These lengthy quotations of Supreme Court affirmance of judicial equitable powers both at trial and appellate levels, as previously stated, are here set forth to illuminate judicial power to protect from irreparable harm.

As stated, one method of protecting from irreparable harm is to insure the status quo by a stay order of the contemplated unlawful action. Another classic method is to require the action party, *i.e.*, the party proposing the doing of an action, to post a surety bond securing the party whom the action offends from financial damage. Other effective methods where financial stability of the action party is established may be requirement for keeping disputed funds collected to be held in trust accounts or to require the keeping of detailed accounts and records of the amounts charged or collected from the challenged action. All of these methods of insuring the accuracy and integrity of the fund are open to a court of equity. They might have been employed by this Court. The Supreme Court chose to employ the self-accounting method by the action party railroads as a condition to lifting this Court's stay order. In so doing, the Supreme Court, in its stay order (409 U. S. 801, 93 S. Ct. 24, 34 L. Ed. 2d 14

(1972), and in Footnote 1 of its principal opinion, made three simple and unequivocal statements:

"1. Keep accurate accounts in detail of all amounts paid, by whom and for whom;

2. If the challenged payments are ultimately found to be unlawful either as a result of direct court judgment or by an administrative agency acting in accordance with or direction of a court judgment, then the payors of such illegally exacted amounts, or their beneficiaries in interest, shall have refunds;

3. The District Court [this Court] shall enter an order, consistent with the Supreme Court opinion, regarding disposition of these amounts."

We rely additionally, as persuasive judicial precedent, upon *United States* v. *Morgan*, 307 U. S. 183, 83 L. Ed. 1211, 59 S. Ct. 795 (1939); *Atlantic Coast Line R. Co.* v. *State of Florida*, 295 U. S. 301, 79 L. Ed. 1451, 55 S. Ct. 713 (1935); *Inland Steel Co.* v. *United States*, 306 U. S. 153, 83 L. Ed. 557, 59 S. Ct. 415 (1939).

The defendant railroads finally contend that even though this Court has the jurisdictional power to direct entitlement of the fund, our equitable disposition should be in their favor. Despite original protestation by the carriers at the original district court hearing that they had no real interest in the money from such increased charges, but only sought the public interest in facilitation of freight shipments by rail and an increased supply of box cars, these railroads now say they have grown attached to the money to such an extent it may be a hardship to disgorge it, and hence inequitable for them to be required to make refund. They further argue that choice of disposition of the fund lies between only the big—the railroads—*vis-a-vis* the grain trade. They point out that whereas the exaction of the unlawful charges was initially from farmers as the grain producers, and/or the small elevators where the grain was delivered by the farmers, by means of deductions made from sale proceeds, these charges were passed along and ultimately paid for record keeping purposes in

the grain trade by the large corporate terminal elevators or Boards of Trade.

Thus, wittingly or unwittingly, the railroads focus on an equitable principle as a justification against their disgorgement, that is, the principle of unjust enrichment which they are "concerned" will occur in the grain trade at the expense of the farmers and country elevators.

Plaintiffs have responded in final briefs to this argument and to previous inquiry by the judges of this Court as to the minuteness of record keeping and accounts in the grain trade by informing the Court that in most instances payments of the illegal in-transit charges are traceable to the local levels for purposes of accurate restitution. Again, however, the mechanics of disposition and enforcement would be a matter of future concern for this Court or a judge of this Court.

However, it is the principle of unjust enrichment, coupled with the keystone of the law—righting a wrong—which commands the judgment of this Court in favor of plaintiffs and against defendants.

Judgment and Order of the Court

In accord with the foregoing opinion, the Court enters judgment for plaintiffs, sustaining their "Motion for Refund," and the following orders in implementation and effectuation of said judgment, viz:

It is ordered that each defendant railroad, within sixty (60) days of this date, file with the Clerk of this Court at Wichita, Kansas, written accounting of the in-transit charges collected during the stay period, and tender therewith into the registry of the Court the amount of money collected by each said railroad from such charges.

It is further ordered that each plaintiff shall within ninety (90) days of this date file a written statement of the amounts paid by it as in-transit charges during such stay period, detailing

whether such payment was one directly originating with it or on whose behalf the payment was made, it being the intention of the Court to have identified for ultimate refund or reimbursement to the actual payors of such in-transit charges at the farmer and/or country elevator levels.

IT IS FURTHER ORDERED that this cause and any legal issues arising further therefrom be transferred to the sole judicial supervision of the Honorable Frank G. Theis, United States District Judge, sitting at Wichita, Kansas, and for any further judicial orders or proceedings found by him to be necessary.

At Wichita, Kansas, this 23rd day of February, 1977.

/s/ (Illegible)
/s/ FRANK G. THEIS
/s/ EARL E. O'CONNOR

APPENDIX B.

INVESTIGATION AND SUSPENSION DOCKET NO. 8548

INSPECTION IN TRANSIT, GRAIN AND GRAIN PRODUCTS

Decided January 21, 1975

1. On further reconsideration, proposed increased charges for in-transit inspection of grain within eastern territory found just and reasonable and otherwise lawful.
2. Proposed charges for second and subsequent stops for in-transit inspection of grain at various points in the United States found shown to be just and reasonable and otherwise lawful.
3. Proposed new charges for the first stop for in-transit inspection of grain at various points in the United States outside the eastern territory found not shown to be just and reasonable and otherwise lawful. Applicable schedules ordered canceled without prejudice to resubmission in accordance with the findings made herein. Proceeding discontinued. Prior reports 339 I.C.C. and 364 and 340 I.C.C. 69.

Appearances as shown in the prior reports and in addition:

Earl E. Pollock and *Garry Senner* for respondents; *John A. Harris, Ronald W. Hill, Paul L. Mills,* and *Michael E. Sullivan* for the Secretary of Agriculture of the United States, protestant; and *Harold E. Spencer* for protestants.

Report and Order of the Commission on Further Reconsideration

O'Neal, *Vice Chairman:*

In the first report, 339 I. C. C. 364, decided April 16, 1971, Division 2 found that proposed new or increased charges for the first in-transit inspection of grain and grain products at various points in the United States were just and reasonable and otherwise lawful and entered its order discontinuing the proceeding.

This proceeding was designated as one presenting an issue of general transportation importance. Consequently, after the filing of petitions for reconsideration of the division's report and order and hearing the parties in oral argument, we reopened the proceeding for reconsideration on the record as made. Although the schedules publishing the new charges became effective on May 4, 1971, they will, for convenience, be referred to as the proposed schedules or charges.

On reconsideration, 340 I. C. C. 69, decided September 21, 1971, we affirmed Division 2's earlier findings and found that the proposed new or increased charges for in-transit inspection of grain at various points in the United States were just and reasonable and otherwise lawful. In addition, the respondents were required to submit 6-month reports, beginning October 1, 1971, on a continuing basis, showing the revenues derived from the collection of the proposed charges. We retained jurisdiction to further review the findings in our prior report after receipt of the aforesaid carriers' reports.

In *Grain and Grain Products,* 205 I. C. C. 301, and 245 I. C. C. 83, the Commission authorized and approved the carriers' practice of providing in-transit inspection without charge in addition to the line-haul rate. Prior to the effectiveness of the proposed schedules, separate charges were made for the second and subsequent inspection stops, but not for the first stop except in the eastern territory where a separate charge for

such service had been in effect for a number of years. Thus, the proposed schedules provided for increased inspection charges in the eastern territory, new first-stop charges formerly included as part of the line-haul rates within southern, western and Illinois territories, and in some instances changed charges for second and subsequent stops in the involved territories.

Shippers who had objected to the proposed new charges before the Commission sought review of our order, and a statutory three-judge District Court was convened. The opinion of the United States District Court for the District of Kansas, *Wichita Board of Trade* v. *United States,* 352 F. Supp. 365, decided May 26, 1972, held that the Commission had not adequately justified its failure to follow "its long established rule that it will not allow a separate charge for an accessorial service previously performed as part of the line-haul rates without substantial evidence that such an additional charge is justified measured against the overall services rendered and the overall reasonableness of the increased line-haul rate resulting therefrom * * *." 352 F. Supp. 365, 368. After holding that the matter must be remanded to the Commission for further proceedings, the District Court ordered "The proposed charges are suspended and shall be ineffective until and unless otherwise ordered by this Court."

On appeal in the United States Supreme Court, sub nom. *Atchison, T. & S. F. R. Co.* v. *Witchita Bd. of Trade,* 412 U. S. 800, decided June 18, 1973, the Court held that the Commission did not explain its apparent departure from precedent in a manner sufficient to permit judicial review of its policies, but that, nevertheless, that kind of error does not justify the District Court in entering an injunction against imposition of the rates pending review of the Commission's action on remand. The action of the District Court was affirmed as to the remand to the Commission and was reversed as to the injunction suspending the proposed charges.

On remand, the Commission, by order dated October 26, 1973, reopened the proceeding for reconsideration on the present record and ordered the parties to file briefs directed to the question of the proper course of action for the Commission now to undertake. Such briefs were ordered to treat, but not be limited to, the legal sufficiency and practical workability of five stated alternatives.

Briefs were filed by respondent railroads; the Secretary of Agriculture of the United States, protestant; and by a number of protestants jointly (See Appendix A) on February 4, 1974. Reply briefs were filed by respondent railroads on March 20, 1974; and by the Secretary of Agriculture of the United States, protestant; and the above-noted protestants on March 21, 1974.

There will be no attempt to restate herein the scope of this extended and highly controversial proceeding. The complex factual and legal issues are described in detail in the earlier reports and in the opinions of the District Court and the Supreme Court. As there is no serious challenge to the major portion of the recitation of facts found in the report of Division 2, as modified in the previous report of the Commission, following a careful review of the division's report and order and an analysis of the record in the light of the arguments advanced orally by the parties, we adopt and affirm the findings of fact reached in the previous reports except to the extent modified herein. Further recitations of facts will be for purposes of clarification only.

Our primary purpose in further considering the issues herein is to examine and evaluate said issues in light of the opinion reached by the Supreme Court. As noted by the Court, our previous decisions were premised on two central findings of fact which we unsuccessfully relied on to distinguish the instant proceeding from *Transit Charges, Southern Territory,* 332 I. C. C. 664 (1968), wherein proposed new transit charges covering services previously included under the line-haul rates were found not shown to be just and reasonable. First, we found that the line-haul rates applicable on the grain to, from, and through the

inspection points number in the thousands and, because of the complexities of the grain rate structures, vary to a large degree. Second, we found that the line-haul rate applicable to any movement of grain when coupled with the proposed charge is less than the maximum reasonable level determined by this Commission in *Grain and Grain Products, supra,* as increased by subsequent general rate increases. However, the Court found that neither the complexities involved in requiring respondent railroads to affirmatively establish the justness and reasonableness of a vast number of line-haul rates nor the rationale utilized to assume the justness and reasonableness of these rates were sufficient to justify an exception to the oft-stated rule that reductions in service require concurrent reductions in line-haul rates, or an affirmative showing of the justness and reasonableness of the line-haul rate at the reduced service level.

On remand, the respondents have alleged that our previous decision should be affirmed on the following grounds: (1) the optional and accessorial nature of the in-transit inspection service; (2) the nonrevenue purpose of the charges; (3) the function and limitations of a section 15(7) proceeding and the availability of other shipper remedies; (4) carriers' freedom to adjust rates within the zone of reasonableness; (5) the Commission's authority to determine the reasonableness of a rate by noncost criteria; (6) the vitality and use of current maxima as a yardstick to identify the upper level of the zone of reasonableness; (7) the consistency of the Commission's approach with prior precedents and the complete absence of any departure from prior norms; and (8) the importance of the freight car shortage in evaluating the reasonableness of the charges.

While respondents are undoubtedly correct that in-transit inspection need not necessarily be a part of the line-haul service in grain movements by virtue of the 1968 amendment to the Grain Standards Act, this fact is without bearing in the instant case. A reduction in service, whether integral or nonintegral to the basic service, must, under previous Commission decisions, be

treated functionally as resulting in increased rates. Inasmuch as the Supreme Court has rejected our attempt to distinguish this proceeding from *Transit Charges, Southern Territory, supra,* including the general rule applied therein, and our repudiation of said rule would not be in the public interest, we have no alternative but to require that the line-haul rates, as increased through a diminution of service thereunder, be justified by appropriate evidence establishing that the aggregate charge for the through service is reasonable. The fact that revenue increase was not one of the stated purposes of the instant proposal and that improvement in service was the primary purpose does not alter the simple fact that the proposal has resulted in increased charges to shippers that must be shown to be just and reasonable.

Respondents' allegations in regard to the limitations of the section 15(7) proceeding are also without application in the instant case. While the 15(7) action is obviously not the only remedy available to shippers, it is the remedy most appropriate to the involved issues. While this proceeding unfortunately has been unusually extensive in terms of time, this alone cannot be the rationale for the Commission to ignore precedents and abritrarily shift the burden of proof to protestants by requiring them to take recourse through the filing of complaints under section 13(1). Notwithstanding that the involved rates have become effective, protestants retain the right to have the involved rates treated as proposed rates and respondents retain the burden of proof in establishing that these rates are just and reasonable and otherwise lawful. This does not limit the carriers' freedom to adjust rates within the zone of reasonableness. It is simply a requirement that respondents must affirmatively show that the adjustments are within the zone. Of course, should relief in addition to that which is provided in this report and order be desired by protestants, action under section 13(1) of the act must be commenced.

While the affirmative establishment of justness and reasonableness need not be based on revenue/cost relationships, the

Commission may not arbitrarily fashion a standard out of whole cloth. Respondents have the obligation to establish that the standard desired is rational and that they have in fact met the standard proposed. It is not the duty of the Interstate Commerce Commission to develop standards for decision making based solely on the needs and/or desires of particular respondents. The use of comparisons of the proposed rates at the reduced level of service with the rates established as maxima 40 years ago has been rejected by the Supreme Court, and the cases in support of the general rule cited by the Court and cited in this report may not be distinguished in the manner suggested by respondents. The destinations drawn by the respondents between those cases and this proceeding are not sufficient to warrant departing from precedent.

While improvent in car utilization is a singularly important goal today, no showing has been made that the economic disincentive attached to a separate in-transit inspection charge would not be equally effective if the line-haul rates are reduced to reflect the reduction in service. In terms of percentages, the cost of the in-transit charge is increased if the line-haul rate is reduced. In terms of the dollar value of the disincentive, there is no difference whether it is added to the current line-haul rates or added to reduced line-haul rates.

As the distinguishing characteristics of the instant case, as presented by respondents, are insufficient to allow an exception to be made to the involved rule as stated in *Terminal Charges at Pacific Coast Ports,* 255 I. C. C. 673 (1943), *Unloading Lumber at New York Harbor,* 256 I. C. C. 463 (1943), *Secretary of Agriculture* v. *United States,* 347 U. S. 645 (1954), *Transit Charges, Southern Territory,* 332 I. C. C. 664 (1968), and *Charges at New York Harbor, Penn Central Transp. Co.,* 344 (I. C. C. 21 (1972), we must find that proposed new charges for the first stop for in-transit inspection of grain at various points in the United States outside the eastern territory are not shown to be just and reasonable and oherwise lawful.

Within the eastern territory, the applicable charge for the first stop was $7.42 prior to the involved increase, and was $13.29 for the second and subsequent stops. As noted in the report and order of Division 2, *supra,* at 339 I. C. C. 364, 366, the proposed per-car charge for each stop within the eastern territory is $14.33. This charge is within the zone of reasonableness as determined in our previous reports and, as no reduction in line-haul service is involved in the eastern territory, we reaffirm our earlier finding that the proposed increased charges for in-transit inspection of grain at various points within the eastern territory are shown to be just and reasonable and otherwise lawful.

For points outside the eastern territory subject to the involved proposal, separate charges for in-transit inspection for the second and subsequent stops have also existed for a number of years. As the charges proposed for all points outside the eastern territory for second and subsequent stops are within the zone of reasonableness as determined in our previous reports and as no reduction in line-haul service is involved with these charges, we reaffirm our earlier finding that the proposed charges for second and subsequent stops for in-transit inspection of grain at various points in the United States are found shown to be just and reasonable and otherwise lawful.

Despite the extended litigation in the involved proceeding, the areas of agreement between the parties are quite large. Respondent railroads view the separation of in-transit inspection charges from the line-haul rates as part of their efforts to alleviate the recurring shortage of freight cars available to serve the Nations' shippers. See generally, *United States* v. *Allegheny-Ludlum Steel,* 406 U. S. 742, 745 (1972). Revenue increases are not desired as a result of the proposal.

The proposal has, based on traffic and revenue data contained in the carriers' reports filed with the Commission during

1. Charges stated herein are subject to authorized general increases subsequent to Ex Parte No. 262, *Increased Freight Rates, 1969,* 337 I. C. C. 436.

the first five 6-month reporting periods, proven to be an effective deterrent to in-transit inspection. Percentages of cars utilizing the service have declined from approximately 55 to 60 percent for the year prior to the effective date of the proposal to 20 to 25 percent for the reporting periods after the proposal became effective. However, the charges collected during the five reporting periods have accrued in amounts approximating $7.6 million. Additionally, the annual rate of collections is increasing rapidly. For the year October 1971, to September 1972, the charges totaled in excess of $2.2 million. For the 12-month period October 1972 to September 1973, the charges totaled in excess of $3.4 million. For the 6-month period October 1973 through March 1974, the charges totaled in excess of $1.96 million, an increase over $400,000 from a similar period a year before and an increase of over $700,000 from a similar period 2 years before.

The protestants do not argue against the imposition of a separate in-transit inspection charge. They appear to concede that the separate charge creates an economic disincentive to the utilization of this service. However, protestants are concerned with the large amounts of money they are paying annually under the new charge and maintain that in effect they are being forced to pay twice for the same service.

As respondents have been unable to affirmatively demonstrate the justness and reasonableness of the line-haul rates at the reduced level of service, it is clear that if the in-transit inspection charge is to be maintained as a separate charge a reduction must be made in the line-haul rates. The obvious difficulty in so doing is that the same multiplicity of rates that made proof of justness and reasonableness difficult also makes a proper rate reduction difficult. The reductions must be equal to the total charges applicable to the service but should not be so large as to cause an unwarranted revenue loss for respondents.

We believe that a proper percentage rate reduction commensurate with the reduction in service may be determined in the following manner.

1. The proposed charge should be determined at a just and reasonable level in light of the cost of service in year x, a year to be chosen by respondents. Cost of service should be determined in a manner consistent with the determination made in the report of Division 2 at 339 I. C. C. 364, 399, 407.

2. The percentage of shipments given first in-transit inspection outside the eastern territory in the 12 months preceding the effective date of the separate in-transit inspection charge should be determined.

3. The number of shipments made under the involved line-haul rates in year x should be determined.

4. The total line-haul revenue for involved movements for year x should be determined.

5. The percentage determined in 2 should be multiplied by the number arrived at in 3 to determine the approximate number of movements that would have been given first in-transit inspection in year x in the absence of the separate charge.

6. The figure arrived at in 1 should be multiplied by the figure arrived at in 5 to determine the total amount of the required reduction in all line-haul revenues.

7. The figure arrived at in 6 should be divided by the figure arrived at in 4 to determine the percentage reduction in present line-haul rates necessary to compensate the shippers for the reduction in service.

A master tariff listing this percentage reduction in line-haul rates for the future would be sufficient until such time as new tariff schedules are published making individual adjustments in the involved rates. To insure fairness to all parties, increases in the in-transit inspection charges, other than general freight rate increases, filed within 1 year from the effective date of the proposed charge must be accompanied by a corresponding reduction in the line-haul rates. We believe that this requirement will lead to the most accurate evaluation of the proper level of charges under paragraph 1 of the above formula.

Protestants allege that as any individual shipper had the right under the old line haul rate to in-transit inspection, and since the new tariff publications eliminate this right, the entire value of this service should be subtracted from each line-haul rate. As it is apparent that only a given percentage of the shippers in any year would avail themselves of the right to in-transit inspection, it is fair to assume that the total cost to the railroads for providing this service was spread over all line-haul rates and thus each shipper has never been charged the total value of the service he had the option of using. The elimination of the service from the line-haul rate and the concurrent reduction of the rate by a percentage determined in the manner hereinabove described, would be equitable to all parties. Shippers not utilizing the service will not be bearing part of the burden for those who do, and shippers utilizing the service will be paying only a just and reasonable charge.

SUMMARY

1. The detention and cost studies presented and discussed in the report of Division 2, establish that the level of charges proposed is commensurate with the cost of service provided.

2. The establishment of the proposed new charges for the first stop for in-transit inspection of grain at various points in the United States outside the eastern territory has, and will in the future, eliminate at least some of the car detention time due to in-transit inspection, and the resultant increased car utilization will make a substantial contribution toward the improvement of the national freight car supply.

3. The reduction in service caused by the elimination of in-transit inspection privileges from line-haul service require either a showing of the justness and reasonableness of the line haul rates for the reduced level of service or, in the alternative, a commensurate reduction in the line-haul rates.

4. In the absence of an affirmative showing of the justness and reasonableness of the line-haul rates, and in the absence of a reduction in the line-haul rates, the imposition of proposed new charges for the first stop for in-transit inspection of grain at various points in the United States outside the eastern territory has not been shown to be just and reasonable and otherwise lawful. This finding is without prejudice to a refiling in the manner hereinabove mentioned.

5. As there is no reduction in the line-haul service within the eastern territory, and as the proposed increased charges have been shown to be at a just and reasonable level, we find that the proposed increased charges for in-transit inspection of grain at various points within the eastern territory are shown to be just and reasonable and otherwise lawful.

6. As there is no reduction in the line-haul service involved in the proposed charges for second and subsequent in-transit inspection charges outside the eastern territory, and as the proposed charges have been shown to be at a just and reasonable level, we find that they are shown to be just and reasonable and otherwise lawful.

7. Since the assessment of the new in-transit inspection charges, if refiled, would be offset by a reduction in the line-haul rates, it is not now appropriate to make a determination as to whether the revenue from those charges should be used by the respondents to upgrade their freight car fleet and accordingly we make no such determination. Therefore, the records and reports required by the Commission's Report and Order of September 21, 1971, need no longer be maintained and filed.

8. This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

COMMISSIONER GRESHAM, concurring in part:

While I concur with the findings made herein, I cannot be shown as joining the majority in their proposed method for

determining the rate reduction and refiling the proposed new charges for the first stop for in-transit inspection of grain at various points in the United States outside the eastern territory.

COMMISSIONER MURPHY, dissenting, in part:

Although I am in agreement with the majority insofar as it would find the proposal just and reasonable except for the charge for the first inspection in the western district, I cannot in good conscience join the majority in that exception. All parties to this proceeding and even the courts recognize the principal reason for the new charge in the western district, i.e., an improvement in the car supply. The record, including the periodic reports filed by the respondents, clearly indicates that the proposal has resulted in a substantial reduction in the inspection of grain which inspection may delay a car for up to 3 days.

However, notwithstanding this important improvement in the car supply, the majority would now order the cancellation of the proposed increase for the first inspection in the western district with a suggested complicated formula and a somewhat ambiguous procedure for establishing such a new charge. There is no assurance that the respondents, if they chose to follow the suggested procedure, will not encounter problems similar to those which beset them in defending their proposal herein. Moreover, in that respect, respondents should be forewarned by the candidness of certain protestants which indicate that upon cancellation of the disputed proposal respondents would have the managerial prerogative to file new schedules after they have amassed appropriate evidence and with the public afforded the opportunity to challenge the new proposal.

As noted previously, the suggested formula and procedure may create insuperable problems. The majority suggests use of a master tariff as a device to establish two levels of rates, one showing the line-haul rate including the full service, the other (the master tariff) containing a percentage reduction from the line-haul rates to reflect the elimination of the inspection service.

The establishment of such a master tariff will further complicate the endeavors of this Commission in encouraging respondents to update their tariffs. But there is a possible further and more serious problem. Normally, the farmer receives payment for this grain at the elevator which includes the market price less the elevator operator's commission and the total rail charges to the market. Assuming that this sequence is followed and the grain is purchased by a dealer who subsequently determines not to have an inspection in transit, the reduction from the line-haul rate as contemplated by the suggested master tariff technique would go to the holder of the shipping documents, not the farmer. The Secretary of Agriculture has vividly portrayed the plight of the farmer in similar circumstances.

As mentioned, many of the protestants point to the substantial reduction in grain inspection since the effectiveness of the schedules herein, bemoan the fact that respondents have secured some revenues from those shippers desiring an inspection, but, more importantly, fail to disclose to what extent they still request and require inspection in transit. Without this information, it is impossible to determine to what extent those protestants are adversely affected by the proposal. In light of the beneficial aspects of the proposal on the car supply and in light of the repeated criticisms relating to service as expressed by shippers and others in many of the recent general increase proceedings, protestants should welcome the opportunity and step forward with suggestions to implement the proposal and not with a simple request for a cancellation thereof. In that respect, Rule 42(a) of the General Rules of Practice, 49 CFR 1100.42(a), offers some guidance. The protest should state, among other things, "what protestant offers by way of substitution." The responses of protestants herein, unfortunately, fail to adequately meet that goal, including a failure to show how protestants will improve the car supply should the schedules be canceled.

In summary, I would approve the proposal in its entirety since it is in the public interest.

It is ordered, That as the proposed new charges for the first stop for in-transit inspection of grain at various points in the United States outside the eastern territory are not shown to be just and reasonable and otherwise lawful, the respondents herein be, and they are hereby, notified and required to cancel the applicable schedules as described in the order of the Commission's Board of Suspension entered on March 25, 1970, on or before 60 days from the date of service of this report and order, upon not less than 1 day's notice to this Commission and to the general public by filing and posting in the manner prescribed under section 6 of the Interstate Commerce Act, without prejudice to the filing of new schedules in conformity with the above-stated conclusions.

And it is further ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission.

ROBERT L. OSWALD
Secretary

(SEAL)

APPENDIX A

Protestants filing briefs on remand

Board of Trade of the City of Chicago
Board of Trade of Kansas City, Missouri
Bunge Corporation
C G F Grain Company, Inc.
California Grain and Feed Association
Cash Grain Association of the Chicago Board of Trade
The Denver Grain Exchange Association
Enid Board of Trade
F. S. Services, Inc.
Far-Mar-Co., Inc.
Fort Worth Grain Exchange
Garvey Elevators, Inc.
Garvey Grain, Inc.

Hollander & Feuerhaken
The Hutchinson Board of Trade
Kansas City Grain Commission Men's Association
Kansas Grain & Feed Dealers Association
Lincoln Grain, Inc.
Los Angeles Grain Exchange
Master Grain Company
Merchants' Exchange of St. Louis
Midwestern Grain Company-Division of Garnac Grain Co., Inc.
Missouri Department of Agriculture
Missouri Farmers Association, Inc.
Mohr-Holstein Commission Co.
National Association of Wheat Growers
National Grain and Feed Association
National Grain Trade Council
Omaha Grain Exchange
Pacific Northwest Grain Dealers Association, Inc.
Peoria Board of Trade
Producers Grain Corporation
St. Joseph Grain Exchange
Sioux City Grain Exchange
State Corporation Commission of the State of Kansas
Stotler & Company
Utah-Idaho Grain Exchange
The Wichita Board of Trade

APPENDIX C.

IN THE UNITED STATES DISTRICT COURT
For the District of Kansas

THE WICHITA BOARD OF TRADE, et al.,
Plaintiffs,
vs.
THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, et al.,
Defendants.

Civil Action
No. W-4730
Three-Judge Court

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the intervening defendant Railroads, The Atchison, Topeka and Santa Fe Railway Company, et al., and each of them, appeal to the Supreme Court of the United States from the Opinion, order and judgment of the Court sustaining plaintiffs' Motion for Refund and entering judgment for the plaintiffs and against these intervening defendants as provided in said judgment and order, all filed on February 23, 1977.

This appeal is taken pursuant to 28 U. S. C. § 1253.

Dated this 2nd day of March, 1977.

CHRISTOPHER A. MILLS
400 West Madison Street
Chicago, Illinois 60606

CHARLES W. HARRIS
CURFMAN BRAINERD HARRIS BELL
WEIGAND & DEPEW
830 First National Bank Building
Wichita, Kansas 67202

/s/ By CHARLES W. HARRIS
Attorneys for Intervening Defendant Railroads, The Atchison Topeka and Santa Fe Railway Company, et al.

CERTIFICATE OF SERVICE

This Is to Certify that a copy of the above and foregoing Notice of Appeal to the Supreme Court of the United States was mailed, postage prepaid, to the following parties on this 2nd day of March, 1977:

The Honorable Griffin Bell
Attorney General
U. S. Department of Justice
Washington, D. C. 20530

Mr. Hanford O'Hara
Office of the General Counsel
Interstate Commerce Commission
Washington, D. C. 20423

Mr. Jack Glaves
Suite 900
O. W. Garvey Building
200 West Douglas
Wichita, Kansas 67202

Mr. Daniel J. Sweeney
1750 Pennsylvania Avenue, N. W.
Washington, D. C. 20006

Mr. Charles J. McCarthy
1750 Pennsylvania Avenue, N. W.
Washington, D. C. 20006

The Honorable E. Edward Johnson
United States Attorney
Room 306, Post Office
401 North Market
Wichita, Kansas 67201

Mr. John A. Harris
Assistant General Counsel
United States Department of Agriculture
Washington, D. C. 20250

Mr. Ronald W. Hill
Assistant General Counsel
United States Department of Agriculture
Washington, D. C. 20250

/s/ CHARLES W. HARRIS
Charles W. Harris

IN THE UNITED STATES DISTRICT COURT
For the District of Kansas

THE WICHITA BOARD OF TRADE, et al., *Plaintiffs,* *vs.* THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, et al., *Defendants.*	Civil Action No. W-4730 Three-Judge Court

AMENDED CERTIFICATE OF SERVICE TO NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I, Charles W. Harris, one of the attorneys for the Atchison, Topeka and Santa Fe Railway Company, et al., intervening defendants herein, hereby certify that on the 2nd day of March, 1977, I served three (3) copies of the attached Notice of Appeal to the Supreme Court of the United States on the several parties thereto, as follows:

1. On The Wichita Board of Trade, et al., plaintiffs, by mailing three (3) copies each in duly addressed envelopes, postage prepaid, to their attorneys of record, as follows:

To Mr. Jack Glaves at Suite 900, O. W. Garvey Building, 200 West Douglas, Wichita, Kansas, 67202

To Mr. Daniel J. Sweeney at 1750 Pennsylvania Avenue, N. W., Washington, D. C., 20006

To Mr. Charles J. McCarthy at 1750 Pennsylvania Avenue, N. W., Washington, D. C., 20006.

2. On the Secretary of Agriculture of the United States, intervening plaintiff, by mailing three (3) copies in a duly addressed envelope, postage prepaid, to Mr. John A. Harris, Assistant General Counsel, United States Department of Agri-

culture, Washington, D. C., 20250, and by mailing three (3) copies in a duly addressed envelope, postage prepaid, to Mr. Ronald W. Hill, Assistant Counsel, United States Department of Agriculture, Washington, D. C., 20250.

3. On the United States by mailing three (3) copies in a duly addressed envelope, postage prepaid, to The Honorable E. Edward Johnson, United States Attorney, Room 306, Post Office, 401 North Market, Wichita, Kansas, 67201, and by mailing three (3) copies in a duly addressed envelope, postage prepaid, to the Solicitor General, Department of Justice, Washington, D. C., 20423.

4. On the Interstate Commerce Commission by mailing three (3) copies in a duly addressed envelope, postage prepaid, to Mr. Hanford O'Hara, Office of the General Counsel, Interstate Commerce Commission, Washington, D. C., 20423.

5. On the United States by mailing three (3) copies in a duly addressed envelope, postage prepaid, to The Honorable Griffin Bell, Attorney General, United States Department of Justice, Washington, D. C., 20530.

CHRISTOPHER A. MILLS
400 West Madison Street
Chicago, Illinois 60606

CHARLES W. HARRIS
CURFMAN BRAINERD HARRIS BELL
WEIGAND & DEPEW
830 First National Bank Building
Wichita, Kansas 67202

/s/ By CHARLES W. HARRIS
Attorneys for Intervening Defendant Railroads, The Atchison Topeka and Santa Fe Railway Company, et al.

APPENDIX D.

IN THE UNITED STATES DISTRICT COURT
For the District of Kansas

THE WICHITA BOARD OF TRADE, et al., *Plaintiffs,* *vs.* THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, et al., *Defendants.*	Civil Action No. W-4730

NOTICE OF APPEAL

Notice is hereby given that the intervening defendant Railroads, The Atchison, Topeka and Santa Fe Railway Company, et al., and each of them, appeal to the United States Court of Appeals for the Tenth Circuit from the Opinion, order and judgment of the Court sustaining plaintiffs' Motion for Refund and entering judgment for the plaintiffs and against these intervening defendants as provided in said judgment and order, all filed on February 23, 1977.

Dated this 2nd day of March, 1977.

CHRISTOPHER A. MILLS
400 West Madison Street
Chicago, Illinois 60606

CHARLES W. HARRIS
CURFMAN BRAINERD HARRIS BELL
WEIGAND & DEPEW
830 First National Bank Building
Wichita, Kansas 67202

/s/ By CHARLES W. HARRIS
Attorneys for Intervening Defendant Railroads, The Atchison Topeka and Santa Fe Railway Company, et al.

CERTIFICATE OF SERVICE

This Is to Certify that a copy of the above and foregoing Notice of Appeal was mailed, postage prepaid, to the following parties on this 2nd day of March, 1977:

The Honorable Griffin Bell
Attorney General
U. S. Department of Justice
Washington, D. C. 20530

Mr. Hanford O'Hara
Office of the General Counsel
Interstate Commerce Commission
Washington, D. C. 20423

Mr. Jack Glaves
Suite 900
O. W. Garvey Building
200 West Douglas
Wichita, Kansas 67202

Mr. Daniel J. Sweeney
1750 Pennsylvania Avenue, N. W.
Washington, D. C. 20006

Mr. Charles J. McCarthy
1750 Pennsylvania Avenue, N. W.
Washington, D. C. 20006

The Honorable E. Edward Johnson
United States Attorney
Room 306, Post Office
401 North Market
Wichita, Kansas 67201

Mr. John A. Harris
Assistant General Counsel
United States Department of Agriculture
Washington, D. C. 20250

Mr. Ronald W. Hill
Assistant General Counsel
United States Department of Agriculture
Washington, D. C. 20250

/s/ CHARLES W. HARRIS
Charles W. Harris

APPENDIX E.

IN THE UNITED STATES DISTRICT COURT
For the District of Kansas

THE WICHITA BOARD OF TRADE, et al., *Plaintiffs,* vs. THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, et al., *Defendants.*	Civil Action No. W-4730

ORDER OF STAY

Now on this 11th day of March, 1977, The Honorable Frank G. Theis, United States District Judge, pursuant to the order of the above entitled Court made and filed on February 23, 1977 ordering that the above entitled matter shall be transferred to the sole judicial supervision of The Honorable Frank G. Theis, United States District Judge, considers the motion of the intervening defendant Railroads for a stay pending appeal.

Having considered said motion and having examined the files herein, the Court finds that said motion should be sustained.

IT IS, THEREFORE, BY THE COURT ORDERED that the motion of the intervening defendant Railroads for a stay pending appeal be and the same is hereby sustained, and the judgment and order of the Court made and filed on the 23rd day of February, 1977 be and the same is hereby stayed pending appeal by the intervening defendant Railroads to the United States Supreme Court and to the United States Court of Appeals for the Tenth Circuit, all subject to the further order of this Court.

/s/ FRANK G. THEIS
United States District Judge

APPENDIX F.

March Term—March 14, 1977

Before THE HONORABLE DAVID T. LEWIS, *Chief Judge*, and THE HONORABLE ROBERT H. MCWILLIAMS, *Circuit Judge*

THE WICHITA BOARD OF TRADE, THE BOARD OF TRADE OF KANSAS CITY, MO., BOARD OF TRADE OF THE CITY OF CHICAGO, OMAHA GRAIN EXCHANGE, ST. JOSEPH GRAIN EXCHANGE, ENID BOARD OF TRADE, THE HUTCHINSON BOARD OF TRADE, SIOUX CITY GRAIN EXCHANGE, MERCHANTS' EXCHANGE OF ST. LOUIS, THE DENVER GRAIN EXCHANGE ASSOCIATION, LOS ANGELES GRAIN EXCHANGE, FORT WORTH GRAIN EXCHANGE, PEORIA BOARD OF TRADE, UTAH-IDAHO GRAIN EXCHANGE, STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, MISSOURI DEPARTMENT OF AGRICULTURE, KANSAS GRAIN & FEED DEALERS ASSOCIATION, et al, EARL BUTZ, Secretary of Agriculture of the United States,
Plaintiffs-Appellees,

vs.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION,
Defendants,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al,
Intervening Defendants-Appellants.

No. 77-1153

This matter comes on for consideration of the motion of the Atchison, Topeka, and Santa Fe Railway Company, et al, for

an order suspending and abating the appeal of the captioned cause pending the disposition of the appeal made to the Supreme Court of the United States on March 2, 1977 from the identical judgment.

Upon consideration whereof, the motion is abated. The Clerk shall remove this appeal from the active docket pending resolution of the appeal to the Supreme Court.

The parties are ordered to notify this Court when the Supreme Court has acted upon the appeal.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips
Clerk

APPENDIX G.

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U. S. App. D. C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 76-1026

SECRETARY OF AGRICULTURE OF THE UNITED STATES,
Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA,
Respondents,

WESTERN RAILROADS, et al.,
Intervenors.

Petition for review of an order of the Interstate Commerce Commission

Argued February 17, 1977
Decided March 11, 1977

Raymond W. Fullerton, Attorney, Office of the General Counsel, United States Department of Agriculture, with whom *James Michael Kelly,* Assistant General Counsel, *John A. Harris,* Assistant General Counsel and *Ronald W. Hill,* Attorney, Office

of the General Counsel, United States Department of Agriculture, were on the brief, for petitioner.

Henri F. Rush, Attorney, Interstate Commerce Commission, with whom *Arthur J. Cerra,* General Counsel and *Charles H. White Jr.,* Associate General Counsel, Interstate Commerce Commission, were on the brief, for respondent, Interstate Commerce Commission, *Carl D. Lawson* and *Catherine G. O'Sullivan,* Attorneys, Department of Justice entered appearances for respondent, United States of America.

Christopher A. Mills, with whom *Edward K. Wheeler* and *Robert G. Seaks* were on the brief, for intervenors, Western Railroads.

Before: BAZELON, *Chief Judge,* TAMM and MACKINNON, *Circuit Judges*

Per Curiam: By decision of January 21, 1975, the Interstate Commerce Commission determined that certain railroads had failed to demonstrate that separate charges for in-individual in-transit grain inspections were "just and reasonable" under 49 U. S. C. § 15(7). 349 I. C. C. 89.[1] The tariffs were ordered cancelled within 60 days, *id.* at 100. At that time, no party had requested that a general refund order be issued and the Com-

1. Prior to initiating the charges in question, a portion of the line-haul rates for grain shipments reflected in-transit inspections. In order to deter such inspections, the railroads added the individual charges to the line-haul rate. A division of the Commission initially determined that the railroads had demonstrated the propriety of the separate charges, and permitted their implementation. 339 I.C.C. 364 (1971). Following approval by the entire Commission, 340 I.C.C. 69 (1971), this decision was overturned by the United States District Court for the District of Kansas, Wichita Board of Trade v. United States, 352 F.Supp. 365 (1972). On appeal to the Supreme Court, the district court's decision was affirmed as to the remand to the Commission but an injunction against continued collection of the charges was reversed. Atchison, T. & S.F. Ry. Co. v. Wichita Board of Trade, 412 U.S. 800 (1973). It was only on remand from the Supreme Court that the Commission found the charges in question to be unjustified. For a fuller description of the history of this case, *see, id.* at 803-806.

mission merely noted that individual aggrieved parties could seek refunds under 49 U. S. C. § 13(1).[2] On September 5, 1975, the Secretary of Agriculture, acting in his statutory capacity as representative of farm interests,[3] moved the I. C. C. to issue a general refund order under 49 U. S. C. § 15(7). That section provides, in pertinent part, that the Commission "may . . . require . . . carriers to refund . . . such portion of such increased rates or charges as by its decision shall be found not justified." The Commission summarily denied the Secretary's request, simply noting that "sufficient grounds have not been presented to warrant granting the action sought." Docket No. 8548 (Nov. 12, 1975). Vice Chairman O'Neal concurred in the result but objected that "the order states no rationale for the Commission's decision." *Id.* The Secretary appealed.

At the outset, the Secretary contends that the refund provision of § 15(7) is mandatory rather than discretionary. He contends that "may order" a refund should be construed as "shall order." Although "may" has on occasion been read as "shall," neither the cases cited[4] nor the legislative history presented by the Secretary[5] support such a reading in this case. In fact, the Supreme Court has recognized that the Commission's authority to order a refund under § 15(7) is discretionary, *Atchison T. & S. F. Ry. Co.* v. *Wichita Board, supra* note 1, 412 U. S. at

2. Unlike § 15(7), § 13(1) does not appear to contain a burden of proof favorable to shippers. Section 13(1) authorizes a party aggrieved by a railroad to petition the Commission for aid in redressing the grievance. The Commission is to forward the complaint to the offending railroad to satisfy or answer. The Commission is authorized to investigate complaints that are not voluntarily satisfied. The section does not expressly authorize the Commission to order relief if an unsatisfied complaint is well-founded.

3. *See* 7 U.S.C. §§ 1291(a) and (b); and 7 U.S.C. § 1622(j). The authority of the Secretary to petition the I.C.C. for the refund order and to pursue this appeal is not challenged.

4. *See* Thompson v. Clifford, 408 F.2d 154 (D.C.Cir. 1968); Wilson v. United States, 135 F.2d 1005 (3rd Cir. 1943).

5. At oral argument, counsel for the Secretary admitted that the legislative history on this point was sparse.

817-826, esp. at 824.[6] There is no reason to believe that use of a discretionary word was inadvertent. Since § 15(7) contains "shall" six times and "may" five times, Congress appears to have deliberately distinguished mandatory and discretionary duties.

The passage of § 202(e)(2)(8)(e) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (Feb. 5, 1976), does not eliminate the Commission's discretion in this case even if, as the Secretary contends, it was intended to apply retroactively. That statute mandates the refund of rates found to be justified only when the Commission has not suspended their collection pending the hearing on their legality. The Commission suspended collection of the individual inspection charge prior to the initial determination of reasonableness, but permitted their collection during judicial review. *I & S Docket No. 8548*, 339 I. C. C. 364 (1971). The statute does not cover this situation.

Nevertheless, the Commission's refusal to issue a refund order cannot be affirmed on this record for the Commission has given no reasons for its decision. *SEC* v. *Chenery Corp.*, 332 U. S. 194, 196 (1947); *Atchison Ry.* v. *Wichita Board*, 412 U. S. at 807 (citing cases). Counsel for the Commission and for the intervening railroads have offered several explanations for the Commission's decision. But "[a]n administrative order can be affirmed on appeal only on the grounds on which the Commission relied," *KIRO, Inc.* v. *FCC*, Nos. 75-1233 and 75-1390 (D. C. Cir. Nov. 4, 1976). There can be no assurance that the

6. The Commission, relying on the portions of the *Wichita Board* cited in text, asserts that relief under Section 15(7) is "by law committed to agency discretion" and therefore immune from review. I.C.C. Br. at 19. Nothing in the Court's opinion holding that the district court's injunction interfered with the Commission's primary jurisdiction to balance competing policies supports this conclusion. In fact, at various points the Court referred to judicial review of the Commission's eventual decision, *e.g.*, 412 U.S. at 825, and its holding in part II of its opinion presupposed judicial review (remand appropriate when Commission fails to spell out its reasons for approving rates with sufficient clarity to permit judicial review).

reasons suggested by counsel were in fact those of the Commission. *Wichita Board*, 412 U. S. at 807 (citing cases).

Consequently, a remand is necessary for the Commission to reconsider the Secretary's request and announce its eventual decision in a reasoned opinion. The Commission must give the question a "hard look" and explain how it has balanced any competing factors. *Greater Boston Television Corp.* v. *FCC*, 444 F. 2d 841, 851 (D. C. Cir. 1971). In this connection, if the Commission decides not to issue a refund order but to allow individual petitioners to proceed under § 13(1), it should spell out what will be required for relief under § 13(1). Will each shipper be required to demonstrate, contrary to the presumption of § 15(7), that separate charges for in-transit grain inspections are unreasonable? Or will the only question be whether and in what amount each shipper was damaged and evaluation of equitable defenses, if any are to be permitted, presented by the offending railroad? Consideration of such questions are essential to a reasoned decision and effective judicial review.

At oral argument we were informed that currently filed § 13(1) actions are being held in abeyance pending the resolution of this appeal. Presumably it will be necessary for these cases to remain in limbo since we have not passed on the merits of the Commission's decision. Consequently, we urge the Commission to reach a decision on this remand with dispatch so that the controversy over these tariffs, now into its sixth year, can quickly come to an end.

Record remanded for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

September Term, 1976

No. 76-1026

Secretary of Agriculture of the United States,
Petitioner,

vs.

Interstate Commerce Commission and United States of America,
Respondents.

PETITION FOR REVIEW OF AN ORDER OF THE INTERSTATE COMMERCE COMMISSION

Before: BAZELON, *Chief Judge*, TAMM and MACKINNON, *Circuit Judges*

ORDER

This cause came on to be heard on a petition for review of an order of the Interstate Commerce Commission and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the record is hereby remanded for further proceedings consistent with the opinion of this Court filed herein this date.

Per Curiam
For the Court
/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Date: March 11, 1977

Opinion Per Curiam

APPENDIX H.

STATUTES INVOLVED

28 U. S. C. § 2325, prior to its amendment by Pub. L. No. 93-584, 88 Stat. 1918 (January 2, 1975), provided as follows:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

28 U. S. C. § 1253 provides as follows:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Section 15(7) of the Interstate Commerce Act, 49 U. S. C. § 15(7), prior to its amendment effective February 5, 1976, by Pub. L. No. 94-210, 90 Stat. 31 (the Railroad Revitalization and Regulatory Reform Act of 1976), provided as follows:

> Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Com-

mission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Section 13(1) of the Interstate Commerce Act, as amended, 49 U. S. C. § 13(1), provides as follows:

> That any person, firm, corporation, company or association, or any mercantile, agricultural or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything

done or omitted to be done by any common carrier subject to the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

APPENDIX I.

The Atchison, Topeka and Santa Fe Railway Company
The Baltimore and Ohio Railroad Company
The Baltimore and Ohio Chicago Terminal Railroad Company
Burlington Northern Inc.
The Chesapeake and Ohio Railway Company
Chicago and Eastern Illinois Railroad Company
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Chicago and North Western Railway Company
Chicago, Rock Island, and Pacific Railroad Company
Colorado and Southern Railway Company
The Denver and Rio Grande Western Railroad Company
Elgin, Joliet and Eastern Railway Company
Erie Lackawanna Railway Company
Fort Dodge, Des Moines & Southern Railway Company
Fort Worth and Denver Railway Company
Grand Trunk Western Railroad Company
Gulf, Mobile and Ohio Railroad Company
Illinois Central Railroad Company
Illinois Terminal Railroad Company
Kansas City Southern Railway Company
Louisville and Nashville Railroad Company
Missouri-Kansas-Texas Railroad Company
Missouri Pacific Railroad Company
Monon Railroad Company
Norfolk and Western Railway Company
Penn Central Transportation Company
St. Louis-San Francisco Railway Company
St. Louis Southwestern Railway Company
Soo Line Railroad Company
Southern Pacific Transportation Company
Texas and Pacific Railway Company
Toledo, Peoria & Western Railroad Company
Union Pacific Railroad Company
Western Pacific Railroad Company